
(2008) 08 OHC CK 0097
In the Orissa High Court

Kalia @ Harikrushna Sahu and Others	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 19-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2008) CLT 1196 (Suppl Crl) : (2008) 2 OLR 704 : (2008) OLR 1196 (Suppl Crl)

Hon'ble Judges : L. Mohapatra, J;B.K. Patel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.K. Patel, J.—By the impugned common judgment and order dated 21.12.2002 passed by the learned Sessions Judge, Ganjam-Gajapati, Berhampur upon an analogous trial, the appellants Kalia @ Harikrushna and Biswanath @ Bisu @ Biska @ Bisakha facing trial in S.C. No. 14 of 2001 and Dandapani and Dillip facing trial in S.C. No. 194 of 2002 have been convicted for commission of offences under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code (in short "I.P.C."). In addition, appellant Biswanath has also been convicted for commission of offence u/s 302 I.P.C. Accordingly all the appellants have been sentenced to undergo imprisonment for life for commission of offence u/s 302 read with Section 149 of the I.P.C. and R.I. for one year on each count for commission of offences under Sections 148 and 148 of the I.P.C. Appellant Biswanath has further been sentenced to undergo imprisonment for life u/s 302 I.P.C. Being aggrieved, the appellants have preferred this appeal.

2. Allegations in the case relate to the occurrence in course of which murder of deceased Laxmi Das was committed. Prosecution case is that on 13.09.1999, which was the day of celebration of "Ganesh Chaturthi", at about 6.15 P.M., the deceased's brother informant P.W.2 Rajendra Das was proceeding to see the Ganesh Medha, i.e. decorative pandal of Lord Ganesh, from Bada Sahi towards

Badhei Sahi Gorji (Lane) of the occurrence village Lochapoda. He found the deceased coming from the side of Ganesh Bazar Sahi. In between the house of D. Laxman Patro and Chintadu Raghuram Patro, on the road itself, appellant Kalia pulled the deceased's legs as a result of which he fell down. Thereafter, it is alleged, the appellants Biswanath, Dandapani and Dillip as well as co-accused Rabindra assaulted the deceased with deadly weapons. It is alleged that co-accused Rabindra at first dealt a blow by means of a Kati on the deceased's neck. Thereafter, appellant Biswanath dealt a sword blow on the deceased's neck. It is further alleged that appellant Dandapani instigated by shouting "SALAKU SESA KARIDIA AAU CHHADA NAHIN". Seeing the occurrence, the informant raised alarm upon which all the five accused persons ran away towards Mill Sahi. Deceased, with injuries on his person, ran towards Bada Sahi where he fell down in front of the house of T. Kalia Patra. The further case of the prosecution is that P.W.4 Balaram Patra and one Rajendra Kumar Patra were present near the place of occurrence. The informant shifted the deceased in a trolley rickshaw to M.K.C.G. Medical College and Hospital, Berhampur. However, on the way the deceased succumbed to the injuries. It is also-alleged by the prosecution that in the month of preceding June, the accused persons had attacked, assaulted and threatened to kill the deceased, and that in the afternoon on the date of occurrence also there was verbal altercations between appellant Dillip and the deceased when the deceased and others were playing volley ball in the playground near Ganesh Bazar. On the basis of written report Ext.1 submitted by P.W.2, S.I. of Police P.W.8 Madhusudan Mallik registered the case and took up investigation. P.W.8 also appears to have received the casualty memo Ext. "A" forwarded by D.W. 1 Dr. M.K. Panigrahi from M.K.C.G. Medical College and Hospital. In course of investigation, witnesses were examined, dead body of the deceased was subjected to inquest and post-mortem examination, spot was visited and seizures were effected. S.I. of Police P.W.1 Bishnupada Mohanta took charge of investigation on 01.11.1999 and S.I. of Police P.W. 7 Ashok Kumar Parida took charge of investigation on 25.03.2000. On completion of investigation, charge sheet was submitted against the appellants and above said co-accused for commission of offences under Sections 147, 148 and 302 read with 149 I.P.C. showing the co-accused as absconder, and accordingly, the appellants faced the trials under the said charges.

3. Defence plea appears to be one of complete denial.

4. Prosecution examined eight witnesses, P.Ws. 1 to 8, apart from relying upon the documents marked Exts. 1 to 9 and material exhibits M.Os. I to XVI. P.Ws. 1, 2, 4, 7 and 8 as well as D.W.1 have already been introduced in course of the narration of the prosecution case. P.W. 3 Kailash Sahu was examined as another eye-witness. P.W. 5 Dr. S. N. Mohanty conducted post-mortem examination over the dead body of the deceased. Police Constable P.W. 6 Rama Chandra Mohanty accompanied the dead body of the deceased for post-mortem examination to and collected wearing apparels of the deceased from the Hospital. Defence examined D.W.1 only and relied upon documents marked Exts. "A" and "B".

Placing reliance on the evidence of informant P.W.2 as well as the other two eye-witnesses P.Ws.3 and 4, and the medical evidence of P.W.5, the learned trial Court held the prosecution to have established the charges under which the appellants stand convicted.

5. in assailing the impugned judgment it is submitted by the learned Counsel for the appellants that in the present case not only the informant P.W.2 but also, P.W.3, not named in F.I.R. to be present at the time of occurrence but examined as eye-witness in Court, as well as P.W.4 stand in the footing of partisan and chance witnesses. It is contended that, in such circumstances, their evidence has to be closely scrutinized in order to arrive at the conclusion that the witnesses are truthful so as to base any finding on their evidence. It is further argued that there is no evidence to indicate that the appellants and co-accused Rabindra harboured common object for commission of any offence. It is also contended that the testimonies of P.Ws.2, 3 and 4 are replete with contradictions and inconsistencies not only with regard to the specific role played by each of the accused persons in the commission of alleged offence but also with regard to the exact spot of occurrence where the deceased was assaulted. The topography of the spot of occurrence improbabilises the claim of the eye-witnesses examined in Court to have seen the entire occurrence from the place at which each of them claims to have seen the occurrence. It is further submitted that the I.O. admitted to have not seized blood stained earth from the spot of occurrence where the assault took place. Such omission on the part of the prosecution renders the prosecution case of the deceased to have been assaulted at the stated place and time doubtful. It is strenuously argued that the informant as well as other two eye-witnesses are got up witnesses, whose evidence with regard to the spot of occurrence as stated in Court is contrary to the spot of occurrence disclosed by P.W.2 immediately after the occurrence before D.W.1 in the hospital. In such circumstances, the prosecution has not been able to establish its case against the appellants beyond reasonable doubt.

Learned Counsel appearing for the State submits that the learned trial Court upon appraisal of the evidence on record has found P.Ws.2, 3 and 4 to be reliable and trustworthy. The evidence of the eyewitnesses got corroboration from the medical evidence of P.W.5, who conducted post-mortem examination over the dead body of the deceased, and the Investigating Officers. In such circumstances, the minor contradictions and inconsistencies appearing in the evidence of the three eye-witnesses do not in any manner effect the veracity of the prosecution case.

6. Having scrutinized the evidence upon reference to the rival contentions, it appears from the evidence of P.W.2 that the house of P.W.2 is located at Berhampur-Lochapoda road at the beginning of Lochapoda village on the left side. According to P.W.2, the house of P.W.4 is also located by the side of that road at a distance of about 30 to 40 cubits from his house. Therefore, the house of P.Ws. 2 and 4 are situated at a considerable distance from the spot Badheisahi

Gorji which is a narrow lane. The case of the prosecution is that P.W.2 witnessed the occurrence while going to see Lord Ganesh from Bada Sahi to Badheisahi Gorji. Therefore, apparently, P.W.2 chanced upon the occurrence coincidentally. Not only P.W.2 happens to be the brother of the deceased, but also he was a co-accused alongwith the deceased in a criminal case bearing G.R. Case No. 579 of 1999 instituted by the accused persons. It is also in the evidence of P.W.2 that a criminal case was lodged as counter case to said case against the accused persons. Thus, the existence of inimical relationship between the parties is apparent. Therefore, P.W.2 is not only a chance witness but also a partisan witness. P.W.3 deposed to have witnessed the occurrence while distributing prasad of Lord Ganesh house wise in Badheisahi Gorji. P.W.3 admitted in his evidence that he faced trial in dacoity case along with the deceased. Therefore, both P.Ws.2 and 3 appear to be close associates of the deceased and partisan witnesses. Also, P.W.4 admitted in his cross-examination that in G.R. Case No. 579 of 1999 he filed affidavit describing the deceased to be his brother while taking him on bail. Thus, P.W.4 also appears to be closely associated to the deceased, and a partisan witness. Though such status of the three witnesses by itself does not render their evidence to be totally unacceptable, their evidence is required to be scrutinized closely in order to arrive at the conclusion that they are truthful witnesses so as to repose confidence in them and to hold their evidence capable to sustain any finding in criminal trial.

7. It is observed that Ext.9 the spot map prepared by the I.O. P.W.8 does not indicate the exact places from which P.Ws. 2, 3 and 4 witnessed the occurrence. The spot map indicates two spots-referred to as "A" spot and "B" spot. Admittedly, the deceased was assaulted at one spot only. After assaulting the deceased and causing injuries on him, his assailants fled away. The second spot appears to be the place where the deceased ultimately fell down after sustaining injuries and running away from the first spot. Both the spots are in a lane connecting Lochapoda-Gurunthi road and Berhampur-Lochapoda road. If one comes through the lane from Lochapoda-Gurunthi road, he has to take sharp right turn in front of house of one Simachal Pradhan in order to proceed towards Berhampur-Lochapoda road. Thus, it is evident that unless one is present right at the place in the lane where it has taken the turn in front of the house of above said Simachal Pradhan, he cannot have the entire view of the lane, i.e., that portion of the lane between Lochapoda-Gurunthi road and the house of Simachal Pradhan; and that portion of the lane between the house of Simachal Pradhan and Berhampur-Lochapoda road. It appears that the portion of the lane between the Lochapoda-Gurunthi road and the turn in front of house of Simachal Pradhan is called "Badheisahi Gorji" and the locality is called Badheisahi. In his evidence P.W.2 did not depose regarding specific spot of assault on the deceased. He simply testified that the occurrence took place when the deceased was coming from Ganesh Bazar towards Badheisahi Gorji. In the F.I.R. P.W.2 disclosed that the occurrence took place between the houses of one D. Laxman Patra and one Chintadu Raghuram Patra. Upon reference to the spot map it is found that "A"

spot mentioned therein is between the houses of D. Laxman Patra and Chintadu Raghuram Patra situated on both sides of Badheisahi Gorji. It is in the evidence of the eye-witnesses that having sustained injuries the deceased got up, ran away from the spot and finally fell down near tea stall of one T. Kalu Patra. Upon reference to the spot map, "B" spot is found to be situated in front of the tea stall of T. Kalu Patra. It is further observed that the above turn of the lane in front of house of Simachal Pradhan situates in between "A" spot and "B" spot. As has been stated earlier, therefore, one could not have seen the assault on the deceased at "A" spot as well as the deceased falling down at the "B" spot unless he was present right in front of house of Simachal Pradhan. Not only it is in the evidence of P.W.2 that at the spot of assault there were blood stains but also P.W.5 deposed that the injuries on the jugular vein and external carotid found on the deceased would cause draining out of deceased's blood in its entirety. However, the I.O. P.W.8 stated that he had seized blood stained and sample earth from a distance of 112 feet away from the place of assault situated at a distance of 35 feet from the main road. He obviously seized the blood stained earth from the road in front of tea stall of T. Kalu Patra. Therefore, non-seizure of blood stained earth from the place of assault is a vital omission on the part of the Investigating Officer leaving evidence of P.Ws. 2, 3 and 4 with regard to the spot of assault uncorroborated by independent source.

8. P.W.2 testified that on the day of occurrence, i.e., on 13.09.1999, prior to the occurrence, appellant Dillip had come and threatened the deceased by saying "TOTE DEKHI NEBU" at about 4.00 P.M. when the deceased, P.W.2 and others had gone to play volley ball. The occurrence took place in the evening when P.W.2 was going from Bada sahi to Badheisahi Gorji to see the idol of Lord Ganesh and the deceased was coming from Ganesh Bazar towards Badheisahi Gorji. P.W.2 alleged that appellant Kalia pulled the deceased's leg as a result of which the deceased fell down. All the other accused persons were present there. Co-accused Rabindra dealt kati blow on the deceased's neck. Accused Bisakha also dealt sword blow on the neck of the deceased. Appellant Dandapani Sahu dealt lathi blow on the deceased. Appellants Dillip and Dandapani were shouting "MAGIAKU SESA KARI DEO". It was also asserted by P.W.2 that appellant Kalia was very much there. P.W.2 deposed to have shouted saying "MARIDELE MARIDELE" upon which all the accused persons fled away towards Mill Sahi. The deceased, in injured condition, proceeded to a little distance and fell down near the tea stall of T. Kalu Patra. P.W.2 also stated that P.W. 4 Balaram Patra as well as Prakash Patra, Rajendra Kumar Patra and Kailash Sahu, who were not examined as witnesses, were there near the place of incident. P.W.2 brought a rickshaw and shifted the deceased to MKCG medical College and Hospital. Prakash Patra, Rajendra Patra and Kailash Patro were stated to have accompanied him to the hospital. The doctor declared the deceased to be dead upon which P.W.2 lodged F.I.R. Ext.1 at Berhampur Sadar Police Station. It is in the evidence of P.W.2 that one month prior to the occurrence, all the accused persons had assaulted him and the deceased for which a case had been

instituted against them. It has been brought out in the evidence that P.W.2, in his police statement made before P.W.8, had not stated that appellant Dillip came and threatened the deceased by saying "TOTE DEKHI NEBU". P.W.2 also had not stated before P.W.8 that appellant Dandapani dealt lathi blow on the deceased, or that Prakash Patra and Kailash Sahu were present at the place of occurrence. Thus, instead of appearing consistent and firm witness, P.W. 2 is found to have improved upon his version in the police statement while deposing in Court.

9. P.W.3 testified that the occurrence took place at about 5 to 5.30 P.M. on Ganesh Chaturthi day in the year 1999 when he was distributing prasad of Lord Ganesh. He saw appellant Dillip standing near the Mill Sahi Chowk being armed with a kati (Banka kati). At that time, the deceased came from Ganesh Bazar towards Badhei Gorji Chowk. Appellant Kalia Sahu coming from behind the deceased pulled the deceased's leg. While the deceased was falling down, co-accused Rabindra came and assaulted the deceased by means of sword on his neck. Thereafter, appellant Bisu @ Bisakha dealt sword blow on deceased's neck. Appellant Dandapani dealt lathi blow on the deceased. Appellant Dillip and Dandapani were shouting to kill the deceased. At that time, P.W.2 raised nullah and co-accused persons fled away towards the Mill Sahi. The deceased could move to a little distance after the assault and fell down near the tea stall of T. Kalu Patra. P.W.3 also deposed to have witnessed the seizure of blood stained earth and sample earth under seizure Ext.3. Though in his examination-in-chief P.W.3 deposed that appellant Kalia came from behind the deceased and pulled the deceased's leg, in his cross-examination he deposed that appellant Kalia pulled the deceased's leg from front side. P.W.2 deposed that the deceased was assaulted by co-accused Rabindra with kati and by appellant Bisakha with sword. However, P.W.3 testified that both co-accused Rabindra and appellant Bisakha dealt sword blows. Moreover, it has been brought out in the evidence that in his statement made u/s 161 Cr.P.C. before the I.O. P.W.8, this witness had not stated that appellant Dandapani gave lathi blow on the deceased, or that P.W.2 made nullah, or that while the deceased was falling down co-accused Rabindra came and assaulted him and thereafter appellant Bisu @ Bisakha dealt sword blow. Thus, P.Ws.3's testimony is also found to be not consistent with his police statement, and with the evidence of P.W.2.

10. P.W.4 deposed that the occurrence took place on Ganesh Chaturthi day at about 4 to 5 P.M. when he was returning from his field through Mill Sahi. He testified to have seen co-accused Rabindra and appellant Bisakha dealing khanda (i.e., sword) and kati blows on the deceased and the other accused persons assaulting the deceased on his legs by means of iron rod. After the assault, the accused persons fled away. The deceased proceeded to a little distance and fell down in front of the shop of T. Kalu Patra. Neither P.W.2 nor P.W.3 deposed regarding assault on the deceased by means of iron rod and on this score, P.W.4 vitally contradicted P.Ws.2 and 3. P.W. 4's version of the time of occurrence also does not tally with the evidence of P.W.2 and the prosecution case.

11. In the background of such infirmities in the evidence of the three witnesses who claim to have seen the occurrence, on scrutiny, it is also found that none of the witnesses testified the exact place from which he saw the occurrence. As has been referred to earlier, P.W.2 stated that the occurrence took place when he was going from Badasahi to Badheisahi Gorji and the deceased was coming towards Badheisahi Gorji from the side of Ganesh Bazar. It is in the cross-examination of P.W.2 that Ganesh Bazar is located at a distance of 1/2 a kilometre from Lochapoda Chowk. Lochapoda Chowk is situated on Berhampur-Lochapoda road. Ganesh Bazar is situated on Lochapoda-Gurunthi road. The lane extends from Ganesh bazar towards Badheisahi Gorji. Badheisahi Chowk is situated at a distance of 30 feet from Lochapoda-Gurunthi road. Badheisahi is located on both the sides of the lane from Badheisahi Chowk onwards which extends towards Bada Sahi. Ganesh Medha, i.e., the pandal had been raised at a distance of about 40 feet from Badheisahi Chowk. P.W.2 asserted to be at a distance of 20 feet from the "place of assault, i.e., near Ganesh Medha" and expressed his inability to say regarding the exact placement of other eyewitnesses. P.W.2 also added that the tea stall of T. Kalu Patra is located where from he saw the occurrence. Thus, it was elicited from the mouth of P.W.2 that he was present near the tea stall of T. Kalu Patra and Ganesh Medha at the time of assault on the deceased. On the face of such assertion, P.W.2 was constrained to admit in his cross-examination that any assault made inside the lane, i.e., in between two walls would not be visible from Ganesh Medha, but any occurrence at the entry of the lane would be very much visible. Having stated so P.W.2 added that the houses of Simachal Pradhan and Dukhishyam Patra are located just at the place of occurrence. P.W.2 also stated in his cross-examination that blood fell down at the place of assault as well as the place where the deceased finally fell down. The distance between the two places being asserted to be 25 cubits, it is in the F.I.R. that the place of assault was in between the houses of D. Laxman Patra and Chintadu Raghuram Patra. The house of Simachal Pradhan, as is evident from the spot map, is at a distance from that spot described as "A" spot. Therefore, it is obvious that in course of cross-examination P.W.2 having been constrained to depose that he was present at the time of assault near the tea stall of T. Kalu Patra and Ganesh Medha from which place any occurrence in the lane would not be visible, hastened to contradict himself with the F.I.R. by stating that the houses of Simachal Pradhan and Dukhishyam Patra are located at the place of occurrence.

12. P.W.3 stated that the occurrence took place when the deceased came from Ganesh Bazar towards Badhei Gorji Chowk. He asserted to have witnessed the occurrence while distributing prasad of Lord Ganesh house wise in Badhei Gorji Sahi and testified that the place of assault was at a distance of about 40 to 50 cubits from Ganesh Medha of Badhei Sahi Gorji. Thus, according to P.W.3 assault on the deceased took place before he reached Badhei Gorji Chowk situated at a distance from the turning of the lane in front of the house of Simachal Pradhan. P.W.3 also stated that he was about 15 cubits away from the place of assault

towards Ganesh Medha and that the deceased crossed him and fell down near the tea stall of T. Kalu Patra. He asserted to be standing near the front verandah of Gopi Patra. There is no evidence that the house of Gopi Patra is situated close to the house of Simachal Pradhan. Rather, the evidence of P.W.2 and the spot map go to show that the house of Dukhishyam Patra is situated near the house of Simachal Pradhan. Evidence of P.W.3 does not indicate that he was present right at the turn of the lane in front of the house of Simachal Pradhan at the time of occurrence.

13. P.W.4 deposed that he witnessed the occurrence while returning from his field through Mill Sahi, but he expressed his inability to say regarding exact or approximate number of houses in the Mill Sahi. According to him, distance between the place of assault and the shop of T. Kalu Patra is about 7 cubits which contradicts the evidence of other witnesses including the evidence I.O. P.W.8, who stated that he seized blood stain from a distance of about 112 cubits away from the place of assault, i.e., 35 yards away from the main road. P.W.8 also says that the Mill Sahi is situated to the northeast of the spot at a distance of 100 yards from the place of assault. On a reading of the evidence of P.Ws. 2, 3 and 4 it is evident that they are far from consistent with regard to the exact place from which they saw the occurrence.

14. All the three witnesses asserted to have seen the assault on the deceased as well as the deceased falling down in front of the tea stall of the T. Kalu Patra. None of them could have seen the assault as well as the deceased falling down unless he was present right on the turn of the lane in front of house of Simachal Pradhan. However, they deposed to have seen the occurrence from different places without pin pointing such places. Such being the nature of evidence of P.Ws.2, 3 and 4, their presence near the spot at the time of occurrence is not free from doubt.

15. The ambiguity and confusion in the evidence of the witnesses regarding the exact spot of occurrence gets further confounded in view of the evidence of D.W.1. D.W.1 was the Casualty Medical Officer of M.K.C.G. Medical College and Hospital on the date of occurrence. He testified that the informant P.W.2 brought the deceased dead to the hospital at 7 P.M.. P.W.2 identified the deceased and according to the version of P.W.2 in the casualty memo the place of assault on the deceased was mentioned to be Khanji Padia. D.W.1 also stated that when he asked P.W.2 regarding the details of assault on the deceased he could not give any information except the fact that the deceased was assaulted. The casualty memo has been marked as Ext.8 and Ext. "A". D.W.1 is a public servant who prepared the casualty memo while discharging his duty as a doctor in the hospital. Not only P.W.2 but also other persons including P.W.4 also accompanied the deceased to the hospital. Immediately after the occurrence the place of assault was stated to be Khanji Padia. In the F.I.R. P.W.3 has not been named as eye-witness and the place of occurrence was stated to be Badhei Gorji Chowk. All the circumstances combined together adds to the doubt regarding the presence

of P.Ws.2, 3 and 4 near the place of occurrence.

Thus, upon scrutiny of evidence on record it is found that not only the evidence of each of the three witnesses P.Ws.2, 3 and 4 suffers from infirmities but also their evidence does not get corroboration from any independent source. On the contrary, evidence of D.W.1 contradicts the prosecution case of the occurrence to have taken place in Badheisahi Gorji. That being the nature of evidence, it is not found safe to be repose confidence on the evidence of P.Ws.2, 3 and 4 in order to come to the conclusion that the deceased was fatally assaulted by the appellants as alleged. The learned Court below having failed to take note of such infirmities in the prosecution evidence, the impugned judgments are liable to be set aside and appellants are entitled to be acquitted.

16. Accordingly, the appeal is allowed. The impugned judgments and orders passed in Sessions Case Nos. 14 of 2001 and 194 of 2002 are set aside. The appellants are acquitted of the charges framed against them. It is stated that the appellant Kalia @ Harikrushna Sahu, Dandapani Sahu and Dillip Kumar Sahu in CRLA No. 17 of 2003 are in custody. If that be so, they be set at liberty forthwith, unless their detention is required in any other case.

L. Mohapatra, J.

17. I agree.